

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

-----X
ALPHONSO LITTLEJOHN,

Petitioner,

-against-

JOSEPH T. SMITH,

Respondent.

-----X

**MEMORANDUM OF
DECISION AND ORDER**
06-cv-1607-ADS

ALPHONSO LITTLEJOHN

Pro Se Petitioner

99A3292

Shawangunk Correctional Facility

P.O. Box 700

Wallkill, NY 12589

THOMAS J. SPOTA

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200 Center Drive

Riverhead, NY 11901-3388

By: Michael J. Miller, Assistant District Attorney

SPATT, District Judge.

Presently before the Court is a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, by Alphonso Littlejohn (“Littlejohn” or the “Petitioner”). For the reasons that follow, the petition is dismissed as untimely.

I. BACKGROUND

Littlejohn petitions this Court pursuant to 28 U.S.C. § 2254 for a writ of habeas corpus. The Petitioner seeks relief from his February 19, 1999 conviction for one count of first degree manslaughter, following a bench trial in County Court, Suffolk County, New York (Weber, J.). The charges arose out of the March 14, 1998 stabbing death of Michael Cooper.

After conviction, the Petitioner was sentenced to 22 years imprisonment. The Petitioner appealed from his judgment of conviction and maintained that his guilt was not proven beyond a reasonable doubt; that his verdict was against the weight of evidence; and that his sentence was excessive. The New York Appellate Division, Second Department, affirmed the conviction. People v. Littlejohn, 307 A.D.2d 976, 762 N.Y.S.2d 921 (2d Dep't 2003). On September 30, 2003, the New York Court of Appeals denied leave to appeal. People v. Littlejohn, 100 N.Y.2d 622, 799 N.E.2d 628, 767 N.Y.S.2d 405 (2003).

On December 28, 2004, the Petitioner moved in the Appellate Division, Second Department for a writ of coram nobis, claiming that his appellate counsel had been ineffective. On March 21, 2005, the Second Department denied the Petitioner's application. People v. Littlejohn, 16 A.D.3d 599, 790 N.Y.S.2d 877 (2d Dep't 2005). On June 14, 2005, the Court of Appeals, *sua sponte*, dismissed the Petitioner's application for leave to appeal "upon the ground that no civil appeal lies to the Court

of Appeals from the order of the Appellate Division denying a motion for a writ of error coram nobis.” People v. Littlejohn, 5 N.Y.3d 742, 833 N.E.2d 706, 800 N.Y.S.2d 371 (2005). Thereafter, the Petitioner properly sought leave to appeal to the Court of Appeals. On October 31, 2005, the Petitioner’s final application for leave to appeal was denied. People v. Littlejohn, 5 N.Y.3d 853, 840 N.E.2d 142, 806 N.Y.S.2d 173 (2005).

On April 3, 2006, Littlejohn filed a §2254 petition in this Court. The petition is dated March 21, 2006. The Petitioner alleges: (1) ineffective assistance of trial and appellate counsel; and (2) actual innocence. In opposition to the petition, the State contends that the Petition is untimely; that Littlejohn failed to exhaust all of his claims; and that the claims are without merit. In response, Littlejohn admits that his petition is untimely, but contends that the statute of limitations should be equitably tolled “because it was the State Appellate Court, and Court of Appeals who did create a denial of the Petitioner’s 14th Amendment Right to Due Process and Equal Protection of the law.” The Petitioner further claims that the statute of limitations should be equitably tolled because in 1999 and 2002 he moved to have his attorneys removed from his case and in March and April 2003 he filed grievances against his trial and appellate counsel.

II. DISCUSSION

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") requires that a petitioner file his or her petition for a writ of habeas corpus within one year from the date the conviction becomes final. See 28 U.S.C. § 2244(d)(1)(A); Fernandez v. Artuz, 402 F.3d 111, 112 (2d Cir. 2005); Williams v. Artuz, 237 F.3d 147, 150 (2d Cir. 2001); Wims v. United States, 225 F.3d 186, 189 (2d Cir. 2000). A conviction becomes final for AEDPA purposes at the conclusion of a petitioner's direct appeal to the highest state court, and the time to seek a writ of certiorari with the Supreme Court of the United States has expired. Fernandez, 402 F.3d at 112 ("a judgment becomes final by the conclusion of direct review or the expiration of the time for seeking such review"); Williams, 237 F.3d at 150. A petition for a writ of certiorari must be filed within ninety days after the conclusion of the petitioner's direct appeal. Fernandez, 402 F.3d at 112.

In the present case, the Petitioner has failed to comply with AEDPA's time restrictions. The Petitioner's direct appeal concluded on September 30, 2003, when the New York Court of Appeals denied his request for leave to appeal. The Petitioner did not file a petition for a writ of certiorari, so his conviction became final for AEDPA purposes ninety days later, on December 29, 2003. The Petitioner thus had one year, or until December 29, 2004, to file a federal habeas corpus petition.

However, the Petitioner did not commence this action until March 21, 2006, the date he prepared his petition, or April 3, 2006, the date the petition was filed, long after the December 29, 2004 deadline had expired. The instant petition is therefore untimely.

However, the AEDPA's limitation period may be tolled under certain circumstances, including the period when “a properly filed application for State post-conviction or other collateral review ... is pending.” 28 U.S.C. § 2244(d)(2). See also Clark v. Stinson, 214 F.3d 315, 319 (2d Cir. 2000) (“the four months that [petitioner's] petition for a writ of error coram nobis was pending in New York are not counted toward the statutory limit”); Dupont v. Phillips, 05-CV-3426, 2006 U.S. Dist. LEXIS 32197, at *6 (E.D.N.Y. May 19, 2006) (“Petitioner filed four post-conviction motions which served to toll the one-year statute of limitations under Section 2254, namely two motions pursuant to N.Y. Crim. Pro. Law 440.10 (‘440’), and two writs of error coram nobis”).

In the present case, the Petitioner did not file his application for a writ of error coram nobis until December 28, 2004, one day before the deadline expired for filing his habeas petition. The coram nobis application was pending in the Appellate Division for 83 days until it was denied on March 21, 2005. An additional 224 days elapsed before the Petitioner’s final application for leave to appeal was denied by the Court of Appeals on October 31, 2005.

Even if the AEDPA's limitation period was tolled for the period of the coram

nobis application's pendency, the Petitioner's habeas corpus petition would still be untimely. The Petitioner's coram nobis application was filed one day before expiration of the limitations period for the habeas petition. Notably, almost the entire year of the limitations period elapsed before the coram nobis application was filed. As a result, tolling the time period when the coram nobis application was pending, the Petitioner had one day to file his habeas petition after the Court of Appeals denied his application for leave to appeal on October 31, 2005. However, the Petitioner waited almost five months to file his habeas corpus petition after the completion of all state court review. As a result, even tolling the time that the coram nobis was pending, the current habeas petition is still untimely.

A federal district court may nevertheless review an untimely petition if equitable tolling principles apply. The limitations period may only be tolled where it is demonstrated that "exceptional circumstances" prevented a petitioner from filing a timely habeas petition, and that the petitioner "acted with reasonable diligence throughout the period he seeks to toll." Warren v. Garvin, 219 F.3d 111, 113 (2d Cir. 2000) (citing Smith v. McGinnis, 208 F.3d 13, 17 (2d Cir. 2000)). To satisfy these requirements, the petitioner must "demonstrate a causal relationship between the extraordinary circumstances on which the claim for equitable tolling rests and the lateness of his filing." Valverde v. Stinson, 224 F.3d 129, 134 (2d Cir. 2000).

In the present case, the Petitioner fails to demonstrate a circumstance that

would warrant equitable tolling. He claims that the limitations period should be equitably tolled because the state courts denied his constitutional rights and he moved to have his attorneys removed from his case and filed grievances. The Petitioner's vague claims regarding the state courts and his contentions that he wanted to have his attorneys removed do not constitute an "exceptional circumstance" that would justify the application of equitable tolling. Moreover, the Petitioner's allegations regarding his counsel, all involve actions taken before September 30, 2003, and therefore, prior to the time that the limitations period even began to run. The Petitioner offers no excuse for his failure to file his petition timely and does not make any excuse for the five month gap between conclusion of all state court review and the filing of his habeas petition. Further, his *pro se* status alone does not warrant equitable tolling. Smith, 208 F.3d at 18.

The Petitioner has failed to meet AEDPA's limitation period. Accordingly, Littlejohn's petition for a writ of habeas corpus is denied.

III. CONCLUSION

For the reasons stated above, it is hereby

ORDERED, that the petition for a writ of habeas corpus is dismissed as untimely; and it is further

Pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure and 28 U.S.C. § 2253(c)(2), a certificate of appealability is **DENIED**, as the Petitioner fails to

make a substantial showing of a denial of a constitutional right. Miller-El v. Cockrell, 537 U.S. 322, 336, 123 S. Ct. 1029, 1039, 154 L. Ed.2d 931 (2003); Lucidore v. New York State Div. of Parole, 209 F.3d 107, 112 (2d Cir. 2000).

ORDERED, that the Clerk of the Court is directed to close this case.

SO ORDERED.

Dated: Central Islip, New York
August 9, 2007

/s/ Arthur D. Spatt
ARTHUR D. SPATT
United States District Judge